

THE NATURAL LAWYER

TRANSPORTATION RESEARCH BOARD COMMITTEE ON ENVIRONMENTAL ISSUES IN TRANSPORTATION LAW (A4006)

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LAND BOUGHT FOR AIRPORT BUFFER BUT USED FOR RECREATION SUBJECT TO SECTION 4F

In 1969 the Air Force transferred Stewart Air Force Base to the New York Metropolitan Transportation Authority (MTA) so that MTA could develop a 4th major airport for the New York area. In 1971 the State of New York started to acquire 8675 acres of land nearby as noise buffer lands. Eventually the old Air Force base and the buffer lands came under the control of the State of New York. In 1974 and 1982 the State entered into agreements that allowed most of the buffer lands to be used for recreational purposes until the airport was developed. As part of the development of the airport, the State proposed to build a new interchange on I-84 and a new access road on the buffer lands. The FAA and FHWA declined to follow the alternatives analysis and mitigation required by Section 4f because the buffer lands had never been permanently designated as parklands. On review the 2nd Circuit disagreed. The Court held that neither FAA nor FHWA were authorized to limit the scope of Section 4f in this way and that the internal guidance of both agencies did not allow the limitation. On remand the Court required that the analysis required by Section 4f be done. The remainder of the issues pertaining to the adequacy of the environmental documents all went in favor of the State and Federal defendants. *Stewart Park and Reserve Coalition, Inc. et al. v. Slater, et al.*, 2nd Cir. No. 02-6272, December 12, 2003.

7TH CIRCUIT FINDS ADEQUATE HARD LOOK AND NO SEGMENTATION ON WISCONSIN GRADE SEPARATION PROJECT

A citizens group was convinced that the construction of bridge pilings to separate a highway grade from a railroad grade was going to cause groundwater contamination. The Wisconsin DOT convinced USEPA and the 7th Circuit Court of Appeals that this was not likely to occur. The Court endorsed the efforts of WisDOT to supplement the record after the EA/FONSI but before it became obvious that the citizens were going to go to court to try and stop the project. Although there was another road widening project nearby which was the subject of an EIS, the bridge project was evaluated according to the FHWA regulations on segmentation and had its own independent justification. As a result, the EA/FONSI for the bridge could proceed independently of the road project. *Highway J Citizens Group v. Mineta, et al.*, 7th Circuit No. 03-2644, November 5, 2003

RAIL PROJECT DESIGNED TO HAUL COAL MUST LOOK AT INCREASED COAL BURNING EMISSIONS

The Surface Transportation Board approved a proposal by the Dakota, Minnesota & Eastern Railroad to construct 280 miles of new rail to reach the Powder River Basin in Wyoming and to upgrade 600 miles of rail in Minnesota and South Dakota. The approved project included upgrades to the rail running through Rochester, MN instead of a bypass. On review the 8th Circuit generally found that the Board's conclusions on direct impacts in its EIS/ROD were appropriate. Some additional analysis was ordered on the need for mitigation from train horns and the synergistic effects of noise and vibration. On the question of analysis of environmental justice factors, the Court endorsed the use of old census data since it led to the use of consistent data sets. The alternatives considered could be limited to those that met the goals of the railroad. The Court found that it was reasonably foreseeable that the demand for coal would be affected by the project since it would reduce the price of coal. Even though there is no way of knowing where the increased coal consumption will occur, it is unreasonable to completely ignore that more coal would be burned for power generation. The Court also remanded for compliance with the National Historic Preservation Act. The Board had adopted a ROD and issued a license without establishing what the appropriate mitigation for adverse effects on historic resources should be or signing a programmatic agreement with the appropriate parties to address these impacts in the future. *Mid States Coal Progress, et al. v. Surface Transportation Board, et al.*, 345 F. 3d 520 (8th Cir. 2003)

WETLANDS PERMIT OK FOR SEA-TAC AIRPORT EXPANSION

The Corps of Engineers issued a permit under Section 404 of the Clean Water Act to allow the filling of 50 wetlands for the third runway project at Seattle-Tacoma International Airport. A group opposed to expansion of the airport sued for review of the permit. The opponents tried to supplement the record with information that indicated that the improvement may not be needed. The Court called this "Monday morning quarterbacking" and did not allow the information because it was not available at the time the Corps made its decision. The Court did allow the airport to supplement the record with the text of studies that had been referenced through executive summaries in the record. The Corps was not required to put in water quality certification conditions that came from the State authorities more than one year after the Corps gave public notice of the permit application. The new information that opponents suggested negated the need for the project (lower aviation demand after 9/11) did not require a supplemental EIS because this information did not change the project's impacts. When the Corps did its public interest analysis, it was entitled to rely on the opinion of FAA on project need. The Corps' mitigation plan was also upheld. The Corps had properly read its own guidance on how to calculate lost wetland functions for the Puget Sound area. Off-site mitigation was upheld because it compensated for lost avian habitat which needed to be relocated away from aircraft operations for safety reasons. *Airport Communities Coalition v. Graves, et al.*, 280 F. Supp.2d 1207 (W.D.Wash.2003)

LAND IN IOWA AG CONSERVATION AREA CAN BE TAKEN FOR COUNTY ROAD

When Allamakee County, Iowa initiated eminent domain proceedings to relocate a county road to align with a new bridge, the landowners tried to stop the county. They alleged that the county could not take the land because the area farmers had voluntarily placed the land in an agricultural conservation area created under Iowa law. The Supreme Court of Iowa examined the statute that authorized the creation of ag conservation areas and concluded that "We do not accept the plaintiffs' contention that the nonagricultural development pressures against which this legislation was designed to protect included the taking of agricultural land for the improvement of local roads." *In Re: Condemnation of Certain Rights*, 666 N.W. 2d 137 (Iowa, 2003).

CORPS AGREEMENT WITH LOCAL GOVERNMENTS ON SOIL EROSION CANNOT BE CHALLENGED

The Chicago District of the Army Corps of Engineers executed an Intergovernmental Cooperation Agreement (ICA) with two local government agencies who regulate soil erosion in Lake County, Illinois. The ICA provided that from time to time the Corps would require applicants for Section 404 and Rivers and Harbors Act permits to submit their soil erosion plans to the local agencies for review. The ICA also provided that the local agencies would perform inspections and recommend corrective action. A local homebuilders group sued to stop the Corps from implementing the ICA. On review the Court found that the process put in place by the ICA had not created a justiciable case. The fact that the ICA may slightly complicate the process of getting and complying with a Corps permit was not adequate. In fact, the ICA may make things easier for applicants. The Court found that this type of integration of Federal and local standards was typical of the Clean Water Act. The ICA was just a general statement of policy. As such it was not final, and the case was not ripe. *Home Builders Association of Greater Chicago v. US Army Corps of Engineers, et al.*, 335 F.3d 607 (7th Cir. 2003)

REVISED NATIONWIDE PERMIT NOT SUBJECT TO REVIEW

When the Corps of Engineers reissued the nationwide permits under Section 404 of the Clean Water Act, the threshold for an individual permit was lowered from 10 acres of wetland impact per project to one-half acre. Preconstruction notification was lowered from impacts of one acre to one-tenth of an acre. The Court found that these decisions were not subject to review because they were not final. Nothing legally binding happens until either an application for an individual permit is denied or an enforcement action is initiated. The fact that there may be additional delay was not sufficient. *National Association of Home Builders, et al. v. US Army Corps of Engineers, et al.*, US District Court, District of Columbia Civ. No. 00-379 (RJL), 11/24/03

NORTH CAROLINA DOT CAN ADOPT HEIGHT LIMITATION FOR SIGNS

When the North Carolina DOT adopted a regulation that limited the height of billboards to 50 feet and then enforced the new standard, the sign companies sued to stop the DOT. There was no question that the DOT had the authority to adopt the restriction. The regulation survived the rational basis test, and the State was not guilty of *laches*. *Capital Outdoor, Inc. et al. v. Tolson*, 582 S.E.2d 717 (N.C.App.2003)

MISSOURI SIGN IS NOT ENLARGED BY THE ADDITION OF AN ADVERTISING MESSAGE

Missouri law was changed to reduce the maximum size of signs from 1200 square feet to 800 square feet of message space. The larger signs were declared nonconforming, and smaller signs could no longer be increased to the old maximum size. The Missouri DOT took action against a sign company that had erected a V-type sign but had only placed advertising on one face before the new restriction was passed. MoDOT contended that the addition of the message on the blank face, not the construction of a sign structure, constituted erection of a sign. On review the Court found that MoDOT's interpretation ran counter to the purposes of the outdoor advertising law. The size of the sign was determined when the structure was built, not when advertising was placed on the structure. *Natural Resources, Inc. v. Missouri Highway and Transportation Commission*, 107 S.W.2d 451 (Mo.App.S.D.2003)

MINNESOTA CAN DENY BILLBOARDS ON GOLF COURSE NOT ZONED COMMERCIAL OR INDUSTRIAL

The Commissioner of the Minnesota DOT ruled that six billboards could not be erected on a municipally owned golf course in the City of Mounds View adjacent to a Minnesota highway. The Commissioner ruled that the property was zoned "PF" for public facilities. This type of zoning did not allow a wide range of commercial uses. On review the Minnesota Supreme Court agreed with the Commissioner. The Court examined the purposes of the Minnesota Outdoor Advertising Act and the Federal Highway Beautification Act and the regulations adopted by FHWA to carry out the Federal law. *In Re: Eller Media Company's Applications*, 664 N.W.2d 1 (Minn.2003)

CHAIR'S CORNER

Submitted by Helen Mountford
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The January TRB Annual Meeting looks like it will be an exciting time. Our committee will meet at 8:00 a.m. on Monday, January 12 in the Johnson Room at the Wardman Park Marriott in Washington, D.C. I need your input for discussion topics. Please get them to me as soon as possible so that I can put together an agenda. I hope many of you will be able to attend in D.C.

Our committee's session, "What's New in Water Law? Jurisdiction, Mitigation and More" will be at 1:30-3:15 p.m. on Monday, Jan. 12 in the Military Room at the Hilton. Many thanks to Peggy Strand who has organized what looks like a very interesting panel.

Then, Monday evening at 6:00 p.m., Dick Jones, former Chair of our Committee, will present the Thomas B. Deen Distinguished Lecture on "Context Sensitive Design: Will the Vision Overcome Liability Concerns?" in Salon 1 at the Marriott. Hopefully many of us will be able to be there for Dick's prestigious presentation.

I look forward to seeing many of you in D.C. in January. Meanwhile, have a very glorious holiday season.

NEXT COPY DEADLINE IS MARCH 15, 2004

Please get your submissions for the April, 2004 *Natural Lawyer* into the Editor by the close of business on March 15, 2004. Please use the e-mail address or FAX number listed at the beginning of the newsletter or mail to Rich Christopher, IDOT, 310 South Michigan, Chicago, IL 60604.